

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
INSURANCE DIVISION**

**In the Matter of the Final Premium                    ) Case No: INS 04-02-005**  
**Audit Billing of    )**  
**)**  
**WEST COAST WALLBOARD, INC.,                    ) PROPOSED ORDER**  
**an Oregon corporation.                                ) ON DEFAULT**  
**)**  
**)**

**HISTORY OF CASE**

Petitioning employer West Coast Wallboard, Inc. (petitioner or WCW) timely appeals a final premium audit billing issued by responding insurer SAIF Corporation (insurer or SAIF) on January 22, 2004 for the period of June 1, 2003 to September 30, 2003 (audit period). The Department of Consumer and Business Services, Insurance Division (the department) referred this matter to the Office of Administrative Hearings (OAH) on March 25, 2004.

On July 7, 2004, OAH Administrative Law Judge Ella D. Johnson conducted a hearing in this matter. Assistant Attorney General David P. Hatton represented the insurer. Petitioner failed to appear at the hearing after being properly notified of the time and place of the hearing. Insurer placed a *prima facie* case on the record to establish that the January 22, 2004 final premium audit billing was correct. Insurer called Premium Audit Program Analyst Teresa Smith as a witness. The record closed on July 7, 2004.

**OFFICIAL NOTICE**

As noted at hearing, I take official notice of the *Basic Manual of Workers' Compensation and Employers Liability Insurance (Basic Manual)*. The *Basic Manual* is a publication of the National Council on Compensation Insurance (NCCI). It includes the rules insurers follow to arrive at the correct class code for a business and the official description for all class codes filed with the department. The *Basic Manual* is a required part of every insurer's audit procedure guide. OAR 836-43-0115(1)(a). I also take official notice of another publication of NCCI, the *Scopes Manual*. The *Scopes Manual* consists of a numerical listing of class codes with descriptive terminology and examples of types of business activities that have been included in class codes in the past.

**ISSUES**

- (1) Whether insurer incorrectly included vacation pay in the premium audit assessment.
- (2) Whether insurer incorrectly moved the operations manager's payroll to Class Code 8742 (Estimator – No Job Hazards).

(3) Whether insurer incorrectly moved the project engineers' payroll for to Class Code 5606 (Contractor- Executive Supervisor).

### **EVIDENTIARY RULINGS**

SAIF's Exhibits A1 through A29 were received into the record without objection.

### **FINDINGS OF FACT**

(1) WCW is a union contractor engaged in the business of installing light gauge steel studs, door frames, wallboard, taping and texturing of installed wallboard, and acoustical ceilings. They also perform exterior plastering/stucco work and lathing. They currently do not perform any jobs involving only taping or texture coating. Calvin Carlson is the president of the company. (Ex. A5.)

(2) On June 9, 2003, SAIF filed a Guaranty Contract with the department naming WCW as an insured. At all times relevant herein, SAIF provided workers' compensation coverage to WCW. SAIF assigned Class Codes 5020 (Ceil Instl – Acoustical – Susp Grid Typ), 5102 (Iron/Steel Erect-Door Frm/Sash-Metl), 5445 (Wallboard Installation & Dr.), 5606 (Contractor – Executive Supervisor), 8227 (Construction/Erect Permanent Yard), and 8810 (Office Clerical). (Exs. A2, A4, A21.)

(3) On January 16, 2004, SAIF auditor Frank Maloney conducted an audit for the audit period. The audit found that payroll had been underreported by \$25,000. The audit noted that splitting time between classifications cannot be based on percentages and that, even if that was permitted, Code 5606 does not allow for division of employee time with Code 8810. Therefore, all payroll of project engineers Winters, Nagy, Lindgren and Killmer was moved to Code 5606. The audit determined that no verifiable time cards were kept for Mittleider's activities, of which five percent was devoted to outside estimating, and therefore all payroll reported in Code 8810 was reassigned to the higher rated Code 8742 for the month of June. The audit also noted that no deduction was given for vacation pay under WCW's Paid Time Off Plan (PTO)<sup>1</sup> because WCW failed to provide records of how much of the payroll was allocated to vacation pay. The audit resulted in \$14,148.43 in additional premium due.<sup>2</sup> (Exs. A9, A10; test. of Smith.)

(4) WCW was duly notified of the hearing set for July 7, 2004 and failed to appear at the hearing and has not contacted OAH with any valid reason for its failure to appear.

### **CONCLUSIONS OF LAW**

(1) Insurer correctly included vacation pay in the premium audit assessment because

---

<sup>1</sup> WCW's PTO plan paid salaried employees when they took sick leave, personal time off and vacation pay. Only vacation pay is excludable from premium assessment.

<sup>2</sup> The majority of the additional premium was the result of the underreported payroll. (Test. of Smith.)

petitioner failed to provide records of the amount of PTO paid as vacation pay.

(2) Insurer correctly moved the operations manager's payroll to Class Code 8742 because petitioner failed to maintain verifiable time records allowing for a division with Code 8810 (Office Clerical).

(3) Insurer correctly moved the project engineers' payroll for to Class Code 5606 because Code 5606 does not allow division of payroll with Code 8810.

### OPINION

The issues to be resolved in this premium audit case are whether insurer incorrectly included vacation pay in the premium audit assessment, incorrectly classified payroll for WCW's Operations Manager to Class Code 8742, and incorrectly classified payroll reported for WCW's Project Engineers to Class Code 5606. In this regard, petitioner has the burden of proving its position on these issues by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Where petitioner fails to appear at hearing after being duly notified of the time of the hearing, and the failure to appear is not due to circumstances beyond its reasonable control, I may issue default order upon a showing of a *prima facie* case made upon the record. OAR 137-003-0670. Here, petitioner was notified by mail of the hearing date, failed to appear and offered no explanation of any circumstances that might excuse the failure to appear. Therefore, I find that a default order is appropriate.

#### Vacation pay

Oregon's state special rule concerning what constitutes remuneration for the purposes of premium assessment is found in NCCI's *Basic Manual* (2001) at Rule V-B., which states in relevant part:

### 2. INCLUSIONS

Remuneration includes:

\* \* \* \* \*

e. Pay for holidays or periods of sickness;

\* \* \* \* \*

### 3. EXCLUSIONS

Remuneration excludes:

\* \* \* \* \*

m. Vacation pay \* \* \*.

(Emphasis in original.)

In previous cases also involving similar PTO plans, the department has determined that the entire amount paid pursuant to the PTO plan was properly included in the premium assessment because petitioner failed to provide records identifying the payments made for vacation pay. *The Pape` Group, Inc* (Final Order March 10, 2004, INS 02-05-012); *Mercy Health Care, Inc.* (Final Order August 27, 1990, INS 89-09-044). Here, Smith testified that petitioner failed to maintain records identifying and separating the payments for vacation from payments made for holiday and sick leave. Consequently, I conclude that SAIF properly included the entire amounts paid pursuant to the PTO plan.

#### Class Code 8742

The audit found that, although the operations manager spent only five percent of his time performing outside estimating activities and the rest in the office, petitioner failed to maintain verifiable time records allowing for the division of payroll between Class Codes 8742 and 8810.

ORS 737.310 (10) requires the director of the department to prescribe by rule “the conditions under which a division of payroll between different manual classifications is permitted for purposes of computing workers’ compensation premiums.” Pursuant to this authority, the director has promulgated OAR 836–042–0060, which defines the conditions under which an employer may allocate payroll between more than one classification. OAR 836–042–0060 provides in relevant part:

(1) When there is an interchange of labor, the payroll of an individual employee shall be divided and allocated among the classification or classifications that may be properly assigned to the employer, provided verifiable payroll records of the employer disclose a specific allocation for each such individual employee, in accordance with the standards for rebilling set forth in OAR 836–043–0190 and this rule.

\* \* \* \* \*

(3) When verifiable payroll records are required with respect to a single employer and the employer does not maintain them as required by this rule, the entire payroll of the employer shall be assigned to the highest rated classification exposure in accordance with the standards

for billing set forth in OAR 836-043-190.

(4) For the purpose of this rule, payroll records are verifiable if they have the following characteristics:

(a) The records must establish a time basis, and the time basis must be hourly or part thereof, daily or part thereof, monthly or part thereof or yearly or part thereof;

\* \* \* \* \*

(c) The records must include a description of duties performed by the employee, to enable the insurer to determine correct classification assignment. Records requiring additional explanation or interpretation are not considered to be verifiable; and

(d) The records must be supported by original entries from other records, including but not limited to time cards, calendars, planners or daily logs prepared by the employee or the employee's direct supervisor or manager. Estimated ratios or percentages do not comply with the requirement of this subsection and are not acceptable for verification. Verifiable records must be summarized in the insured employer's accounting records.

(Emphasis added.)

As the court noted in *Pease v. NCCI*, 128 Or App 471, 475 (1994), the purpose behind the requirement that a payroll record be verifiable is to enable a third party to independently confirm by reviewing the employer's payroll records that the correct method of classification has been used to report payroll. This review must be able to be accomplished without resort to other sources and the records themselves must accurately describe the work performed.

Smith testified that petitioner failed to maintain and produce verifiable time records allowing for division of payroll between Code 8742 and 8810. Consequently, I find that SAIF properly moved all payroll for the operations manager to the highest-rated applicable classification, Code 8742.<sup>3</sup>

Class Code 5606

---

<sup>3</sup> Petitioner is fortunate that SAIF moved payroll to Code 8742 for only the month of June.

Petitioner allocated the project engineers' wages by percentage<sup>4</sup> between Codes 5606 and 8810. The audit moved all payroll of project engineers Winters, Nagy, Lindgren and Killmer to Class Code 5606, noting that Code 5606 does not allow for a division of labor with Code 8810.

The *Basic Manual* description of Class Code 5606 states in relevant part:

**5606 CONTRACTOR- EXECUTIVE SUPERVISOR OR  
CONSTRUCTION SUPERINTENDENT**

\* \* \* \* \*

4. Code 5606 is not available for division of a single employee's payroll with any other classification.

(Emphasis in original.)

Smith testified that petitioner allocated the project engineers' payroll by percentage between Codes 5606 and 8810. As noted above, Code 5606 does not permit a division of payroll with another classification. Consequently, I find that SAIF properly moved the project engineers' payroll to Code 5606.

Accordingly, having found that the insurer presented a *prima facie* case on the record, I conclude that WCW failed to meet its burden of establishing its position on the issues concerning audit and affirm the audit.

**ORDER**

SAIF's final premium audit for the audit period of June 1, 2003 to September 30, 2003 is correct and payable.

**IT IS SO ORDERED.**

Dated this 14<sup>th</sup> day of July 2004.

/s/ Ella D. Johnson  
Ella D. Johnson, Administrative Law Judge  
Office of Administrative Hearings

---

<sup>4</sup> Allocation of payroll between class codes by percentage is also not permitted. *Basic Manual* Rule 2. G.2. b.

## **NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW**

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this Proposed Order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this Proposed Order. Mail exceptions to:

Mitchel D. Curzon  
Chief Enforcement Officer  
Oregon Insurance Division  
PO Box 14480  
Salem OR 97309-0405